

June 20, 2016

SUBMITTED ELECTRONICALLY VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Communication
MB Docket No. 15-216 – *Implementation of Section 103 of the STELA*
Reauthorization Act of 2014: Totality of the Circumstances Test
MB Docket No. 10-71 – *Amendment of the Commission’s Rules Related to*
Retransmission Consent

Dear Ms. Dortch:

On June 16, 2016, the undersigned, appearing as counsel to Mediacom Communications Corporation (“Mediacom”); Thomas Larsen, Mediacom’s Senior Vice President, Government and Public Relations (by telephone); Ross Lieberman, Senior Vice President, Government Affairs, American Cable Association (“ACA”); Barbara Esbin of Cinnamon Mueller, appearing as counsel to ACA; and Jeffrey Blum, Senior Vice President and Deputy General Counsel, DISH Network Corporation (“DISH”) (jointly the “industry participants”) met with FCC General Counsel Jonathan Sallet and Susan Aaron of the Office of General Counsel. The purpose of the meeting was to continue recent discussions between the industry participants and the Commission staff regarding the Commission’s authority (i) to deem a negotiating party’s refusal to extend an expiring retransmission consent agreement under certain circumstances a violation of the good faith negotiation rules and (ii) to require interim carriage of a broadcast station as a means of remedying violations of the good faith retransmission consent negotiation rules as well as a means of preserving the status quo pending resolution of complaints alleging such violations.¹ The industry participants also expressed their individual views on the issue of

¹ See, e.g., Letter from Seth Davidson to Marlene H. Dortch, MB Docket Nos. 10-71 and 15-216 (May 5, 2016), Letter from Seth Davidson to Susan Aaron, MB Docket Nos. 10-71 and 15-216 (May 10, 2016); Letter from Michael Nilsson to Marlene H. Dortch, MB Docket Nos. 10-71 and 15-216 (May 18, 2016); Letter from Jeffrey Blum, Ross Lieberman, and Thomas Larsen to Marlene H. Dortch, MB Docket Nos. 10-71 and 15-216 (May 31, 2016).

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mandatory arbitration as a means of resolving retransmission consent disputes, and the bundling of broadcast stations with regional sports networks (or other “must have” programming assets).²

The industry participants reiterated that broadcasters refuse to extend expiring agreements as a negotiating tactic to coerce MVPDs into accepting the broadcasters’ demands even when the parties have not reached a “true impasse” in their negotiations. Broadcasters also time their blackout threats to coincide with marquee television events. Additionally, broadcasters pull their broadcast signals at the same time that they blackout other popular non-broadcast programming, such as regional sports networks, as a means of extracting higher prices for both “must have” programming assets. The Commission can and should adopt rules deeming the refusal to extend an expiring agreement under such circumstances either a *per se* violation of the good faith negotiation requirement or factors that can be cited in a complaint alleging a violation based on the “totality of the circumstances.”

The industry participants addressed the Commission’s authority to order interim carriage as a means of redressing alleged violations of the good faith rules as well as other instances of unreasonable behavior on the part of broadcasters with respect to requests for retransmission consent, pointing out again that there is nothing in Section 325 that bars the Commission from ordering a station to give its consent to interim carriage (or from deeming such consent to have been granted by operation of law) as a remedial measure. Moreover, Section 325 expressly confers on the Commission the authority to regulate the exercise of the retransmission consent right and other provisions of the Act give the Commission its well-settled plenary authority to ensure that broadcast stations are operated in the public interest.

The industry participants responded to and rebutted the broadcasters’ argument that support for the Commission’s adoption of a rule requiring interim carriage of a broadcast station cannot be found in the Commission’s adoption of an interim franchise requirement as a means of addressing violations of Section 621(a)(1) of the Act. Although both situations involve statutory provisions that bar cable operators from taking certain actions without the assent of a third party (*i.e.*, the award of a franchise to provide cable service from a local franchise in the case of Section 621 and the grant of retransmission consent to carry a broadcast station in the case of Section 325), the broadcasters contend the two situations are distinguishable because Section 621 expressly bars franchising authorities from unreasonably refusing to award a competing franchise, while Section 325 does not make it unlawful for a broadcaster not to enter into a retransmission consent agreement. However, the broadcasters’ argument ignores the common theme that links the two situations: namely, that the discretion of the actor is qualified, not absolute. In the case of Section 621, the constraint on the LFA’s discretion is a requirement to act reasonably. In the case of Section 325, the constraint is the mandate to act in good faith.

² See ACA Totality of the Circumstances Comments at 26-32 (filed Dec. 1, 2015); ACA Totality of the Circumstances Reply Comments at 40-53 (filed Jan. 14, 2016).

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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Finally, the industry participants noted that the recent decision of the D.C. Circuit in *United States Telecom Ass'n et al. v. FCC et al.*, No. 15-1063 (D.C. Cir. June 14, 2016) supports the conclusion that the APA's notice requirements do not create an obstacle to the Commission's authority to order interim carriage as a remedial measure or of the specific revised good faith rules that have been proposed in MB Docket Nos. 10-71 and 15-216 as means of protecting consumers from the use of blackouts as a coercive negotiating tactic.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Seth A. Davidson", with a long horizontal flourish extending to the right.

Seth A. Davidson
*Counsel to Mediacom Communications
Corporation*

cc: Jonathan Sallet
Susan Aaron
Ross Lieberman
Barbara Esbin
Jeffrey Blum
Thomas Larsen